IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

AMIGOS LABOR SOLUTIONS, INC., *et al.*,	§	
	§	
Plaintiffs,	§	
	§	
v.	§	Civil Action No. 3:16-CV-00840-N
	§	
THOMAS E. PEREZ, *et al.*,	§	
	§	
Defendants.	§	

ORDER

This Order addresses Plaintiffs Amigos Labor Solutions, Inc., Labor Consultants International, Co. Ltd., Mas Labor H2B, LLC, and VTB Solutions, Inc. d/b/a Practical Employee Solutions's (the "Agent Plaintiffs") motion for a temporary restraining order, preliminary injunction, emergency hearing, declaratory judgment, and writ of mandamus [8].[1] Because the balance of the harms and the public interest do not favor the entry of a temporary restraining order, the Court denies the motion in part.

[1]After submitting their motion for a temporary restraining order and an appendix in support [10], the Agent Plaintiffs proceeded to file a series of other documents, including a supplemental appendix [17], an alternative proposed order [19], a second supplemental appendix [20], a third supplemental appendix [22], and a second alternative proposed order [28]. The Local Civil Rules of the Northern District of Texas do not authorize such filings, and the Agent Plaintiffs did not seek leave of the Court to make them. In addition, the Agent Plaintiffs' voluminous filings made consideration of their motion for a temporary restraining order more difficult. In order to afford the Federal Defendants an opportunity to respond to the Agent Plaintiffs' new legal positions and evidence, the Court grants the Federal Defendants' unopposed motion for leave to file a surreply [27].

The Agent Plaintiffs are in the business of procuring H-2B visas for nonagricultural temporary workers on behalf of their employer clients. Most of the Agent Plaintiffs' clients are in the hospitality and landscaping industries. These businesses require seasonal and peakload supplements to their workforce beginning in the early spring. The Agent Plaintiffs, in an effort to meet their clients' needs, filed multiple applications for temporary labor certification and petitions for H-2B visas with the Department of Labor ("DOL") and the Department of Homeland Security ("DHS").

The H-2B visa process involves the coordination of multiple federal agencies. By regulation, an employer seeking H-2B workers must "apply for a temporary labor certification with the Secretary of Labor." 8 C.F.R. § 214.2(h)(6)(iii)(A), (D). The Office of Foreign Labor Certification ("OFLC") of the DOL determines whether there are a sufficient number of qualified U.S. workers to perform the temporary services or labor for which the employer seeks to hire foreign workers. 8 C.F.R. § 214.2(h)(6)(iii)(A). OFLC also determines whether the employment of H-2B workers will adversely affect the wages and working conditions of similarly employed U.S. workers. *Id.* Once an OFLC Certifying Officer issues a Final Determination certifying or partially certifying the employer's application, the employer must petition U.S. Citizenship and Immigration Services ("USCIS") of the DHS for a nonimmigrant worker visa. 8 C.F.R. § 214.2(h)(2)(i)(A). If USCIS grants the employer's petition, then the employer can begin the process of scheduling Consular interviews in the temporary workers' home countries and arranging for the workers' travel to the United States.

The Agent Plaintiffs claim that the DOL, the DHS, and their officials[2] have failed to timely adjudicate their certification applications and visa petitions, and that these delays are causing their businesses irreparable harm. The Agent Plaintiffs seek an injunction and writ of mandamus requiring the Certifying Officer of the OFLC to issue temporary labor certifications for all pending applications filed by the Agent Plaintiffs and their employer clients.[3] The Agent Plaintiffs also seek to require USCIS officials to authorize the issuance of all H-2B visas for which the Agent Plaintiffs and their employer clients have petitioned. Finally, the Agent Plaintiffs ask the Court to order the Federal Defendants to cease all further delays in the adjudication of their labor certification applications and visa petitions.

To obtain a temporary restraining order, the movant must demonstrate: "(1) a substantial likelihood of success on the merits, (2) a substantial threat of irreparable injury if the injunction is not issued, (3) that the threatened injury if the injunction is denied outweighs any harm that will result if the injunction is granted, and (4) that the grant of an injunction will not disserve the public interest." *Janvey v. Alguire*, 647 F.3d 585, 595 (5th Cir. 2011). The Agent Plaintiffs bear the burden of persuasion on each of these elements. *Id.* If the Agent Plaintiffs fail to carry their burden on just one of these elements, the Court will deny the temporary restraining order.

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[2]The Agent Plaintiffs join Thomas E. Perez, in his official capacity as U.S. Secretary of Labor; William Thompson, in his official capacity as acting Administrator of the OFLC; Brian Pasternak, in his official capacity as Deputy Administrator of the OFLC; the DOL; Jeh C. Johnson, in his official capacity as Secretary of the DHS; Leon Rodriguez, in his official capacity as Director of the USCIS; Donald Newfeld, in his official capacity as Associate Director Service Center Operations Directorate of the USCIS; Laura Zuchowski, in her official capacity as Director of the USCIS Vermont Service Center; Kathy A. Baran, in her official capacity as Director of the USCIS California Service Center; and the DHS as defendants (collectively, the "Federal Defendants").

[3]The Agent Plaintiffs have submitted three proposed orders. *See* Proposed Order [8-1]; Proposed Alternative Order [19]; Second Proposed Alternative Order [28]. The Court briefly summarizes the relief sought in the Agent Plaintiffs' Second Proposed Alternative Order.

The balance of the harms and the interests of the public do not support the relief requested by the Agent Plaintiffs. The Agent Plaintiffs assert three types of harm that they will suffer if the Court declines to issue a temporary restraining order: business closure, reputational harm, and financial losses. The first type of harm, business closure, refers to the Agent Plaintiffs' clients and not the Agent Plaintiffs themselves. The Agent Plaintiffs have submitted proof of one employer client that closed its doors due to the delay in obtaining H-2B workers. *See* Compl., Ex. 12, Part 3 [1-12]. However, the Agent Plaintiffs have not shown that any other employer client is facing imminent closure. The Court therefore finds the risk of business closure speculative. The second type of harm, reputational harm, is minimal. The Agent Plaintiffs have not alleged they were singled out for negative treatment. Indeed, the Federal Defendants' delayed processing of H-2B applications appears to affect all agents, including the Agent Plaintiffs' competitors. Any reputational harm that the Agent Plaintiffs suffer is unlikely to render them less competitive within the industry.

The Agent Plaintiffs' employer clients are clearly suffering substantial financial losses as a result of the Federal Defendants' delays. The Agent Plaintiffs estimate that about 14,300 proposed workers have missed their start dates. Compl. ¶ 11. Some of the missed start dates were as early as February this year. *Id.* ¶ 46. Due to the temporary nature of these employment needs, many of the employer clients cannot make up for these lost business opportunities at a later date. In addition, the shortage of workers has created a strain on the employer clients' existing businesses. For example, one client cites increased overtime hours, decreased productivity, mounting fatigue and safety concerns, and rising customer dissatisfaction, all due to its inability to obtain H-2B workers on time. Compl., Ex. 12, Part 1. The Agent Plaintiffs cite multiple sources that have found a business's inability to secure temporary workers negatively affects the domestic workforce as well, particularly those in support, management, sales, and administrative positions. *See, e.g.*, Compl., Ex. 12, Part 53 (Madeline Zavodny, *Immigration and American Jobs*, American Enterprise Institute and the Partnership for a New American Economy, Dec. 15, 2011) & Part 54 (ImmigrationWorks USA, *The Economic Impact of H-2B Workers*, U.S. Chamber of Commerce) [1-13].

The Agent Plaintiffs' own financial losses, however, are not so apparent. The Agent Plaintiffs claim that they "expected to earn their major revenue for the year" during this period. *Id.* ¶ 102. According to representatives for each of the Agent Plaintiffs, these delayed petitions account for between 53 and 80 percent of their annual revenue. *See* Pls.' First Supp. App. 018, 035, 048, & 062 [17]. The Agent Plaintiffs state that their contracts with the employer clients condition full payment for these petitions on the substantial completion of the H-2B process. *See id.* The Agent Plaintiffs anticipate that they and their employer clients will incur millions in losses. *Id.* ¶ 110. However, suffering delays in payment is not the same as suffering "millions" in losses. Perhaps the financial losses the

Agent Plaintiffs anticipate are due to lost business opportunities. Anecdotally, the Agent Plaintiffs show that one client turned down a work opportunity valued at $750,000 because it could not import the necessary workers – workers for whom the Agent Plaintiffs presumably could have petitioned. Compl., Ex. 12, Part 4. But the Agent Plaintiffs have not provided concrete evidence that the delays will cause them any additional lost business, at least in the near term.

Moreover, the Court must weigh these impending financial losses against the harm that will result if the temporary restraining order is granted. The Agent Plaintiffs essentially seek to shortcut DOL and DHS's discretionary management of the H-2B visa program. Although many of the employer clients received approvals in previous years, DOL and DHS still must evaluate each case to ensure that the issuance of labor certifications and H-2B visas are warranted under the priorities set forth by Congress. The public has an interest in DOL and DHS's careful processing of these requests. *See, e.g.*, *New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (holding that, even where applications "are almost invariably approved," the government still has an interest in investigating and examining each application). The immigration of temporary workers to the United States poses potential threats to the economic security of the homeland and the health of the labor market. For that reason, in evaluating H-2B visa applications, both DOL and DHS must determine whether the proposed temporary workers will displace other qualified U.S. workers, and whether they "will adversely affect the wages and working conditions of similarly employed U.S. workers." *See* 8 C.F.R. § 214.2(h)(6)(iii)(A); 20 C.F.R. § 655.1(a);

8 C.F.R. § 214.2(h)(1)(ii)(D); *see also* 6 U.S.C. § 111 (stating DHS's mission is, in part, to "ensure that the overall economic security of the United States is not diminished"). "Few interests can be more compelling than a nation's need to ensure its own security." *Wayte v. United States*, 470 U.S. 598, 611 (1985).

The Court determines that the balance of harms and the public interest do not support the entry of a temporary restraining order. The temporary restraining order proposed by the Agent Plaintiffs "goes well beyond simply maintaining the status quo . . . [and] is particularly disfavored." *Martinez v. Matthews*, 544 F.2d 1233, 1243 (5th Cir. 1976). Although the employer clients' businesses are clearly suffering, the Agent Plaintiffs have not shown that maintenance of the status quo during the pendency of their application for a preliminary injunction will wreak irreparable harm on their own businesses. The Federal Defendants, by contrast, have an interest in protecting the public from economic insecurity, labor displacement, and adverse impacts on prevailing wages and working conditions. Because the Agent Plaintiffs have not sustained their burden of persuasion, the Court declines to enter the proposed temporary restraining order. The Court reserves ruling on the Agent Plaintiffs' application for a preliminary injunction.

Signed April 4, 2016.

David C. Godbey
United States District Judge